IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

WILLIAM M. PRICE, Administrator of HENRY C. MILLER, deceased, *Appellant*, *vs.* THE UNITED STATES and the OSAGE INDIANS.	}	No. 247.

Appeal from the Court of Claims.

STATEMENT AND BRIEF FOR APPELLANT.

Statement.

This is an appeal from a judgment of the Court of Claims on the Indian depredation claim of appellant under the act of Congress of March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations."

The claim was made by appellant as the representative of Henry C. Miller, a citizen of the United States, on account of a depredation of the Osage Indians, then at amity with the United States, in 1847. Prior to the passage of the act of 1891, the claim had been pending in the Interior Department for several years, and had been allowed by the Secretary of the Interior after a full investigation of the Indian Department, in the sum of six thousand eight hundred dollars ($6800) to appellant as the representative of Henry C. Miller, and one thousand four hundred dollars ($1400) to the representative of Philip W. Thompson. These judgments were reduced by the Court of Claims in the case of Miller to four hundred dollars ($400) and in the case of Thompson to one hundred dollars ($100.)

In the Court of Claims the government elected to reopen the case and filed a general traverse (Rec., p. 6), but introduced no new evidence.

The government therefore assumed the burden of proof, and as it introduced no new testimony the case was decided, as required by the statute, upon the proofs taken by the Internal Department, the claim being one which had been "examined, approved and allowed" by the Secretary of the Interior.

The undisputed facts which were found by the Court of Claims in its findings of facts, as well as stated in its opinion, are as follows:

In the year 1847, Henry C. Miller and Phillip W. Thompson, citizens of the United States and residents of the County of Saline in the State of Missouri, started from their residence with five (5) wagons heavily laden with valuable merchandise and twenty-two yoke of oxen, bound for Santa Fe, New Mexico, where they intended to dispose of their merchandise. On the 26th of June 1847, when they were in camp on the stream called Coon creek, near the Arkansas river, on the route from west-

ern Missouri to Santa Fe, they were attacked by a band of Osage Indians, then at amity with the United States, without any cause or provocation, and twenty and one-half yoke of oxen were driven away. Being thus left with only one and a half yoke of oxen in a wilderness and uninhabited country, Miller and Thompson were without any means of transporting their goods, and they were therefore compelled to sell the goods and wagons to a trader for less than two thousand dollars; this sum being but a fraction of their value. Miller and Thompson immediately made application to the local Superintendent of Indian Affairs, who took their depositions and proofs; they then made an unsuccessful appeal to the Osage Indians in council, and to Congress, and finally filed their claim in the Interior Department where, after thorough investigation by the Indian Department, it was allowed, as above stated, by the Secretary of the Interior, December 13, 1889.

These facts were recited substantially by the Court of Claims in its opinion, (See Rec., p. 8.) Thus the court says:

"The claim was presented to the Interior Department "in June 1872, and on December 13, 1889, the Secretary "of the Interior recommended an allowance of eight "thousand two hundred and fifty dollars ($8250), (that "is for both Miller and Thompson) which was not paid. In "the amount is embraced the loss on the goods. The "claimants brought suit on the allowance of the secretary, "but the defendants elected to reopen the case, contesting it on the ground that the allowance of the Secretary "was erroneous as to the loss on the goods. The defendants have not by the introduction of new evidence "sought to attack the claim upon the whole case, but upon "the specific ground that the allowance is based upon an "erroneous construction of the law as to the extent of the "claimants' right of recovery."

The case therefore turned on the single question whether the claimants on the admitted facts could recover

the admitted loss sustained in consequence of the destruction of the means of transportation of their property in the wilderness. The Court of Claims held that they could only recover the value of the oxen actually taken, and that the loss on the value of their property thus necessitated was not a "taking" or "destruction" within the meaning of the act. The Court of Claims, therefore, reduced the finding of Miller from six thousand eight hundred to four hundred dollars, and that of Thompson from one thousand four hundred to one hundred dollars, the reduced figures being the interest of each in the oxen driven away. The court's findings of facts and conclusions of law are as follows (Rec., p. 7):

"This case having been heard by the Court of "Claims, the court, upon the evidence, finds the facts as "follows:

I.

"At the time of the depredation hereinafter stated, "claimant's decedent, Henry C. Miller, was a citizen of "the United States and a resident of the State of Missouri "where claimant now resides.

II.

"On the 26th day of June, 1847, near the Arkansas "river, on the route from Western Missouri to Santa Fe, "at a place in what is now the State of Kansas, Indians "belonging to the Osage tribe took and drove away thirty-"two head of oxen, the property of said decedent, which "at the time and place of taking were reasonably worth "the sum of four hundred dollars ($400).

"At the time said oxen were taken they were being "used by said decedent in the transportation of goods "along the route aforesaid, and in consequence of such "taking decedent was compelled to abandon the trip and "sell his portion of said goods and four (4) wagons "belonging to him for the sum of one thousand two hun-"dred dollars ($1200).

"The goods and wagons of said decedent at the time "of the depredation were reasonably worth the sum of "seven thousand six hundred dollars ($7600).

"Said property was taken, as aforesaid, without "just cause or provocation on the part of the owner or his "agent in charge and has not been returned or paid for.

III.

"At the time of said depredation said defendant "Indians were in amity with the United States.

IV.

"A claim for the property so taken was presented to "the Interior Department in June, 1872, and evidence was "filed in support thereof."

Conclusion of Law.

"Upon the foregoing findings of fact the court decides "as a conclusion of law, that the claimant is entitled to "recover judgment against the United States and the "Osage tribe of Indians in the sum of four hundred dol- "lars ($400), out of which amount the sum of eighty "dollars is to be paid to John Goode, Esq., as attorney's "fees.

"The petition as to the claim for goods and wagons "belonging to claimant's decedent and disposed of as set "forth in finding II is dismissed for want of jurisdiction."

The administrator of Miller therefore appeals to this court, while the claim of Thompson, not being of the jurisdictional amount for appeal, is held in the Court of Claims abiding the result of this appeal.

The Statute.

As the judgment of the Court of Claims was based upon its view of its jurisdiction under the Act of 1891,

for the convenience of the court, we here set out that Act in full:

[PUBLIC—139.]

An act to provide for the adjudication and payment of claims arising from Indian depredations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled—That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and *finally adjudicate*, in the manner provided in this act, all claims of the following classes, namely:

First. All claims for property of cittzens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge and not returned or paid for.

Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject however, to the limitations hereinafter provided.

Third. All just offsets and counter claims to any claim of either of the preceeding classes which may be before such court for determination.

SECTION 2. That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government: *Provided*, That no claim accruing prior to July first, eighteen hundred and sixty-five, shall be considered by the court unless the claim shall be allowed or

has been or is pending, prior to the passage of this act before the Secretary of the Interior or the Congress of the United States. or before any superintendent, agent sub-agent or commissioner, authorized under any act of Congress to enquire into such claims; but no case shall be considered pending unless evidence has been presented therein: *And provided further*, That all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof. or shall be thereafter forever barred: *And provided further*, That no suit or proceeding shall be allowed under this act for any depredation which shall be committed after the passage thereof.

SECTION 3. That all claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committted, as near as may be, the property lost or destroyed, and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved. The petition shall be verified by the affidavit of the claimant, his agent, adminstrator, or attorney, and shall be filed with the clerk of said court. It shall set forth the full name and residence of the claimant, the damages sought to be recovered, praying the court for a judgment upon the facts and the law.

SECTION 4. The service of the petition shall be made upon the Attorney-General of the United States in such manner as may be provided by the rules or orders of said court. It shall be the duty of the Attorney-General of the United States to appear and defend the interests of the Government and of the Indians in the suit, and within sixty days after the service of the petition upon him, unless the time shall be extended by order of the court made in the case, to file a plea, answer or demurrer on the part of the Government and the Indians, and to file a notice of any counterclaim, set-off, claim of damages, demand, or defense whatsoever of the Government or of the Indians in the premises: *Provided*, That should the

Attorney-General neglect or refuse to file the plea, answer, demurrer, or defense as required, the claimant may proceed with the case under such rules as the court may adopt in the premises; but the claimant shall not have judgment for his claim, or for any part thereof, unless he shall establish the same by proof satisfactory to the court; *Provided*, That any Indian or Indians interested in the proceedings may appear and defend, by an attorney employed by such Indian or Indians with the approval of the Commissioner of Indian Affairs, if he or they shall choose so to do.

SECTION 5. That the said court, shall make rules and regulations for taking testimony in the causes herein provided for, by deposition or otherwise, and such testimony shall be taken in the county where the witness resides, when the same can be conveniently done, and no person shall be excluded as a witness because he is a party to or interested in said suit, and any claimant or party in interest may be examined as a witness on the part of the Government; that the court shall determine in each case the value of the property taken or destroyed at the time, and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such tribe can be identified.

In considering the merits of claims presented to the court, any testimony, affidavits, reports of special agents or other officers, and such other papers as are now on file in the departments or in the courts, relating to any such claims, shall be considered by the court as competent evidence and such weight given thereto as in its judgment is right and proper: *Provided*, That all unpaid claims which have heretofore *been examined, approved and allowed by the Secretary of the Interior*, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and

eighty-five, and subsequent Indian appropriation acts, *shall have priority of consideration by such court*, and judgments for the amounts therein found due shall be rendered, unless the claimant or the United States shall elect to re-open the case and try the same before the court, in which event the testimony in the case given by the witnesses and the documentary evidence, including reports of Department agents therein, may be read as depositions and proofs: *Provided*, That the party electing to re-open the case shall assume the burden of proof.

SEC. 6. That the amount of any judgment so rendered against any tribe of Indians *shall be charged against the tribe by which*, or by members of which, the court shall find that the depredation was committed, and shall be *deducted and paid* in the following manner: First, *from annuities due said tribe from the United States*; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their curreut and neccessary support, subsistence and education; and, fourth, if no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe.

SEC. 7. That all judgments of said court shall be a final determination of the causes decided and of the rights and obligations of the parties thereto, and shall not thereafter be questioned unless a new trial or rehearing shall be granted by said court, or the judgment reversed or modified upon appeal as hereafter provided.

SEC. 8. That immediately after the beginning of each session of Congress the Attorney-General of the United States shall transmit to the Congress of the United States a list of all final judgments rendered in pursuance of this act, in favor of claimants and against the United

States, and not paid as hereinbefore provided, which shall thereupon be appropriated for in the proper appropriation bill.

SEC. 9. That all sales, transfers, or assignments of any such claims heretofore or hereafter made, except such as have occurred in the due administration of decedents' estates, and all contracts heretofore made for fees and allowances to claimants' attorneys, and hereby declared void, and all warrants issued by the Secretary of the Treasury, in payment of such judgments, shall be *made payable* and delivered only to the claimant *or his lawful heirs*, executors or administrators or transferee under administrative proceedings, except so much thereof as shall be allowed the claimants' attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys, and the allowances to claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case and entered of record as part of the findings thereof; but in no case shall the allowance exceed fifteen per cent. of the judgment recovered, except in case of claims of less amount than five hundred dollars, or where unusual services have been rendered or expenses incurred by the claimant's attorney, in which case not to exceed twenty per cent. of such judgment shall be allowed by the court.

SEC. 10. That the claimant, or the United States, or the tribe of Indians, or other party thereto interested in any proceedings brought under the provisions of this act, shall have the same rights of appeal as are or may be reserved in the Statutes of the United States in other cases, and upon the conditions and limitations therein contained. The mode of procedure in claiming and perfecting an appeal shall conform, in all respects as near as may be, to the statutes and rules of court governing appeals in other cases.

SEC. 11. That all papers, reports, evidence, records and proceedings now on file or of record in any of the departments, or the office of the secretary of the Senate, or the office of the Clerk of the House of Representatives, or certified copies of the same, relating to any claims authorized to be prosecuted under this act, shall be furnished to the court upon its order, or at the request of the Attorney-General.

SEC. 12. To facilitate the speedy disposition of the cases herein provided for, in said Court of Claims, there shall be appointed, in the manner proscribed by law for the appointment of Assistant Attorney-Generals, one additional Assistant Attorney-General of the United States, who shall receive a salary of twenty-five hundred dollars per annum.

SEC. 13. That the investigation and examinations, under the provisions of the acts of Congress heretofore in force, of Indian depredation claims, shall cease upon the taking effect of this act, and the unexpended balance of the appropriation therefor shall be covered into the Treasury, except so much thereof as may be necessary for disposing of the unfinished business pertaining to the claims now under investigation in the Interior Department, pending the transfer of said claims and business to the court or courts herein provided for, and for making such transfers and a record of the same, and for the proper care and custody of the papers and records relating thereto.

Approved March 3, 1891.

BRIEF.

I.

The claim having been allowed by the Secretary of the Interior, his finding, in the absence of new testimony, was conclusive, as to the *quantum* of damages sustained, and judgment for the amount therein found should have been rendered. (See Sec. 4, of the Act of 1891, Laws of the United States, of 1885, p. 376; Act of March 3, 1885). The election to reopen by the Government placed upon the Government the burden of proof, and in the absence of new testimony the allowance of the Secretary of the Interior was final.

There is nothing in Leighton's case, 161 U. S. 291, inconsistent with this, as there the claimant elected to reopen for the sole purpose of increasing the allowance, and introduced additional testimony, and it was developed that a jurisdictional fact was wanting. Here, the only issue was as to the amount of damages for an admitted depredation.

II.

The damages found by the Secretary of the Interior were the damages actually sustained by the plaintiff from the Indian depredation.

Price vs. United States, 33 Ct. of Cl., 106.

Eaton vs. R. R. Co., 51 N. H., 504.

McAfee vs. Crofford, 13 How., 447.

Hale on Damages, p. 43.

Railroad Co. vs. Kellog, 94 U. S., 469.

The term "consequential," as applied to these damages, is essentially misleading. They were in no sense remote.

1 Sedwick on Damages (8th Ed.) Secs. 110 and 124 and 133.

Derry vs. Fletcher, 118 Mass., 131.

Griffin vs. Colver, 16 N. Y., 489, 491.

III.

The Act of 1891 and the Act of 1885 must be construed together, and the words "taken and destroyed" in the Act of 1891, must be construed as the equivalent of "damaged or destroyed" in the Act of 1885.

Valk vs. United States, 28 Ct. of Claims, 241.

Valk vs. United States, 29 Ct. of Claims, 62.

Swope vs. United States, 33 Ct. of Claims, 223.

Friend vs. United States, 29 Ct. of Claims, 425.

Johnson vs. United States, 160 U. S., 550.

IV.

The Court of Claims erred in holding that the Act of March 3, 1891, limited the jurisdiction of the court in the allowance of damages from the depredation to cases of total loss or annihilation; but on the contrary the words "taken or destroyed" were used in a broad and comprehensive sense, including the damages *necessarily* resulting to property from depredation.

Pumpelly vs. Green Bay Co. 13 Wall., 166.

Eaton vs. R. R. Co., 51 N. H., 504.

Story vs. N. Y. El. R. R. Co., 90 N. Y., 122.

Cooley on Const. Limitations (2d Ed.), p. 545.

In Re Chestnut Street, 118 Pa. St., 593.

Spencer vs. R. R. Co., 23 W. Va., 415.

Jones vs. Erie R. R. Co., 151 Pa. St., 46.

Railway Co. vs. Minnesota, 134 U. S., 456.

V.

The purpose of the statutes of 1891 was remedial, to afford a form for the adjudication of claims, giving indemnity for depredations where the injured party was not at fault, and the construction of the Court of Claims in the case at bar defeats the primary purpose of the enactment.

United States and the Sioux Nation vs. Northwestern Stage and Transportation Co., 164 U. S., 686.

United States vs. Gorham, 165 U. S., 316.

Corralitos Stock Co. vs. United States, 33 Ct. of Cl., 342.

Salios vs. United States, 32 Ct. of Claims, 68.

23 Am. & Eng. Ency. of Law (1st Ed.), p. 319, p. 322, *et seq.*

Endlich on Interpretation of Statutes, Secs. 73 and 103.

ARGUMENT.

I.

The question first presented by this record is the status of this claim before the Court of Claims as one "examined, approved and allowed" by the Secretary of the Interior, the Government electing to reopen thus assuming the burden of proof, but offering no evidence in support thereof.

Under Section 1 of the Act of 1891, jurisdiction is conferred upon the Court of Claims "to inquire into and "finally adjudicate, in the manner provided in the act, all "claims in the following classes, namely: First. All "claims for property of citizens of the United States "taken or destroyed by the Indians belonging to any tribe, "band or nation in amity with the United States, without "just cause or provocation on the part of the owner or "agent in charge, and not returned or paid for. Second. "Such jurisdiction shall also extend to all cases which "have been examined and allowed by the Interior Depart- "ment, and *also to such cases as are authorized to be exam- "ined* under the act of Congress making appropriations "for the current and contingent expenses of the Indian "Department, and for fulfilling the treaty stipulations "with the various Indian tribes for the year ending June "30, 1886, and for other purposes, approved March 3, "1885, and under subsequent acts; subject, however, to "the limitations hereinafter provided."

Section 4 of the same act provides as follows:

"* * * Provided, that all the unpaid claims which "have heretofore been examined, approved and allowed "by the Secretary of the Interior, or under his jurisdic- "tion, in pursuance of the act of Congress making appro- "priations for the current and contingent expenses of the "Indian Department, and for fulfilling treaty stipulations "with the various Indian tribes, for the year ending June "30, 1886, and for other purposes, approved March 3,

"1885, and subsequent Indian appropriation acts, shall "have priority of consideration by such court, and *judg.* "*ments for the amounts therein found due shall be rend-* "*ered*, unless either the claimant or the United States "shall elect to reopen the case and try the same before "the court, in which event the testimony in the case given "by the witnesses, and the documentary evidence, includ- "ing the reports of department agents therein, may be "read as depositions and proofs; provided, that the party "electing to reopen the case shall assume the burden of "proof."

The Act of March 3, 1885, is thus explicitly referred to, and thus incorporated with the Act of 1891. The sec tion bearing upon investigation of Indian depredation claims is as follows (Laws of United States of 1885, p. 376):

"For the investigation of certain Indian depredation "claims, ten thousand dollars, and in expending same the "Secretary of the Interior shall cause a complete list of "all claims heretofore filed in the Indian Department, and "which have been approved in whole or in part, and now "remain unpaid, and also all such claims as are pending, "but not yet examined, on behalf of citizens of the United "States, on account of depredations committed, charge- "able against any tribe of Indians, by reason of any "treaty between such tribe and the United States, includ- "ing the name and address of the claimants, the date of "the alleged depredation, by what tribe committed, the "date of examination and approval, with a reference to the "date and clause of the treaty creating the obligation for "payment, to be made and presented to Congress at its "next regular session; and the Secretary is authorized "and empowered, before making such report, to cause "such additional investigation to be made, and such "further testimony to be taken as he may deem necessary "to enable him to determine the kind and value of all "property *damaged or destroyed* by reason of the depre- "dations aforesaid, and by what depredations were com- "mitted, and his report shall include his determination "upon each claim, together with the names and resi- "dences of witnesses, and the testimony of each, and

"also what funds are now existing or to be divided by "reason of treaty, or other obligation, out of which the "same should be paid."

As found by the Court of Claims the claims of Miller and Thompson were pending in the Department of Interior at the time this Act of 1885 was passed. The Secretary under this act was authorized and empowered to investigate this and other claims and to determine the amount and value of all the property damaged or destroyed. He did investigate and did determine from the evidence the amount of damage in this case, and it is admitted by the court that this damage was established by the undisputed evidence. The Act of 1891 gives this class of cases priority and directs that judgments for the amounts found due shall be rendered, unless the case shall be reopened, and the burden of proof is cast upon the party reopening.

It is true that this court held in the case of Leighton vs. United States, 161 U. S., 291, where the claimant reopened the case in the Court of Claims, that it appeared upon such reopening that the Indians committing the depredation did not belong to a tribe at amity with the United States, and that therefore an essential jurisdictional fact was wanting, which compelled the court to dismiss the claim. So here, if it had appeared on the Government's or claimants' reopening the case, that the Osage Indians were not at amity with the United States, or that the claimants were not citizens, then that case would have been in point. But in the case at bar, no such question is presented. The court, in the second clause of the first section of the Act of 1891, was given jurisdiction to inquire into and finally adjudicate all cases which had been examined and allowed by the Interior Department, and was empowered to render judgment for the amounts awarded by the Secretary, unless on the reopening of the case new evidence should be adduced, or, as in the Leighton case, some jurisdictional defect should be

developed. It is true the Court of Claims bases its conclusion upon what it calls a want of jurisdiction, but clearly the measure of damages to property for an admitted depredation was not jurisdictional in the sense that the citizenship of the claimant, or the state of amity of the tribe, were clearly jurisdictional.

But discussion upon this point—whether this matter of the measure of damages could be jurisdictional in the case of a claim found and allowed by the secretary—is really conclusively answered by the express reference in the Act of 1891 to the Act of March 3, 1885, which is thus, by reference, incorporated with the Act of 1891. By this Act of 1885, the secretary was directly authorized and empowered to determine the kind and value of all property "*damaged* or destroyed." The secretary was therefore authorized to investigate and determine just what he did investigate and determine, to-wit: the actual damages to the property of complainants, sustained by the depredation.

It certainly will not be seriously contended that the Act of 1891 is to be construed as precluding the Court of Claims from giving judgment for damages for an admitted depredation, which the secretary, under the Act of 1885, was authorized and empowered to ascertain and award.

Even then, if we concede, which we do not, that the words "taken or destroyed" in the Act of 1891 are to be construed in the narrow and technical sense adopted by the Court of Claims, this canstruction can have no application to the claims for the damages awarded by the secretary under the express authorization and direction of the Act of 1885.

It will be observed that the Court of Claims in its review of the Indian claim legislation entirely overlooked the significant language of the Act of 1885.

II.

We do not concede, however, that there is any warrant for the narrow and technical construction given by the Court of Claims to the words "taken or destroyed," as to any claims under the act of 1891. It is admitted by the Court below, in its opinion, that the damages found by the Secretary were the damages actually sustained by the claimant from this depredation. The theory of the court below is fully stated in the following excerpt from its opinion, (Rec., p. 10):

"If this were a proceeding at common law against "an ordinary wrongdoer in the form of an action *ex* "*delicto*, the right to recover to the full extent of the "injury inflicted, including direct and consequential dam- "ages, would be clear and unquestionable; but it being a "proceeding under a *statute*, the phraseology of which "limits the extent of the recovery, and the consequent "right of recovery, the rule is different. The property "actually taken in the depredation was the oxen, and the "damages incident to the rest of the property were the "*consequential* results of such taking."

It is thus conceded, as it must be, that the loss, though consequential, was proximate, and recoverable in a common law action of *tort*. As to the use of this word "consequential," in reference to damages, it is well said by the Supreme Court of New Hampshire in the leading case of Eaton vs. R. R., 51 N. H. 504, that it merely introduces an equivocation into the discussion. The term is used sometimes as to mean damage that is so remote as not to be actionable, and sometimes damage which, while not direct or immediate, is yet sufficiently proximate to be actionable. An interesting illustration is found in McAfee vs. Crofford, 13 How. 447. This was a suit against defendant for abducting plaintiff's slaves. It was proved that the male slaves were employed in cutting cord wood and supplying Crawford's wood yard. He

had at the time of the trespass, it was proved, from 1,800 to 2,000 cords of wood cut on the low ground back of the river, which was worth $2.00 per cord, and sold at the yard for $2.50. The hauling cost fifty cents per cord. The river became swollen by rain, and having no hands to remove the wood to the yard much of it was carried off by the flood, and what remained was so injured by being under water as to make it unsalable. Having no hands to attend to the crops the horses, mules and other stock of the neighborhood broke into the corn fields and destroyed a large part of it. The Court said:

McLean J.: "The loss of the services of the slaves "by the trespass necessarily resulting from the abduction "of a part of them, and driving off the others, are "clearly within the rule of damages in the trespass, and "we think the loss of the cord wood as proved, and the "injury to the corn crop, were also within it.

" * * * The question was fairly submitted to "the jury, whether under the facts and circumstances "proved, the injury to the corn crop resulted from the "loss of the hands. This was a matter of fact for the "jury, whether the fence of the plaintiff was good or bad; "if by reason of the loss of the slaves the breaches in "the inclosure could not be repaired, or the plaintiff was "unable to guard the fields, as was his custom, was an "inquiry for the jury; and in making up their verdict "they must have considered the facts and circumstances "connected with this branch of the case.

"The same remarks apply to the cord wood. Had "the plaintiff not been deprived of his hands, he might "have removed, sold or in some other manner secured the "wood from being flooded off by the flood. In regard "to the corn and wood, if the damage was a consequence "which necessarily followed the loss of the hands, the "plaintiffs in error were liable."

See Hale on Damages, p. 43.

In the language of Sedgwick on Damages (8th Ed.) Vol. 1, Sec. 110: "All remote damages are consequen-

"tial, but all consequential damages are not necessarily "remote. It is not consequenttial but remote damages which are excluded. Certain consequential damages are "always proximate." (See Sedgwick, Sec. 124.)

The test is, was the loss the natural consequence to be anticipated from the wrong? Upon the facts at bar, there can be no question. The only use of the teams was to transport the merchandise to a market. In the wilderness the merchandise was valueless. When the means of transportation was destroyed, the value of the property was gone. This was not speculative, remote or uncertain damages in any sense, but it was the certain consequence, naturally and inevitably to be anticipated.

Where plaintiff has been deprived of machinery or other means of carrying on his business, he may recover for the loss of business, if such loss naturally follows.

See 1st Sedgwick on Damages, 8th Edition, Section 133.

So loss is recoverable on account of the deprivation of the means of protection to person and property.

Derry vs. Fletcher, 118 Mass., p. 131.

The same principle is illustrated by the frequent application of the doctrine in suits against carriers, for delay in delivery, where it is held that plaintiff may recover compensation for decline in market value during time of delay.

See cases cited in 1 Sedgwick, Section 135.

So it is well settled that gain prevented is ground for compensation *i. e.* profits which would have been realized but for defendant's wrong. Such damages when clearly

established, are not speculative, but held to be the natural consequence of the wrongful act.

See Griffin vs. Colver, 16 N. Y., 489, 491.

The owner of goods may always recover the market price of goods at the place where he should have had them, and it is immaterial if profits are included in this aggregate price at the place of delivery.

The rule of damages under the facts of the case at bar must be the same as would be applied if a suit had been brought against the parties who committed the depredation; that is to say, the natural consequences of the wrongful act. If the wagons and merchandise had been abandoned and wholly lost in consequence of the loss of the means of transportation, the full value at the place to which they were being transported would have been the measure of damages, which value would have included the profit which claimants would have realized but for the wrongful act. This is the rule which is constantly applied in cases against railways. There is nothing speculative or contingent about it. It necessarily follows that whatever they did lose in thus being deprived of the means of transportation to the market, is just as recoverable as the value of the oxen themselves.

It follows, therefore, that the damages claimed, *while consequential*, are the natural and proximate consequence of the wrongful act, and therefore, are recoverable as such damages are always recoverable. They are even recoverable in actions for breach of contract where the consequences, in the nature of things, must have been brought to the knowledge of the party against whom they are claimed. A *fortiori*, they are always recoverable in case of tort where they are not only the natural but the inevitable consequence of the wrongful act.

It is true, as said by this court in R. R. Co. v. Kellog, 94 U. S. 469, that there is an efficient intermediate cause, the resort of the sufferer must be to the originator of the independent cause. But in the case at bar the only intervention was the chance passing of a trader, to whom the complainants were compelled to sell on his own terms or leave their property abandoned in the wilderness. His intervention operated to *reduce* the loss, and had he not intervened there would have been a total loss.

It is unnecessary to cite other illustrative cases of these fundamental principles of the law of damages, which are really conceded by the court below.

III.

The question, as seen, is one of statutory construction. The Act of 1891 and the Act of 1885 must be construed together, and the words "taken or destroyed" in the Act of 1891 must be construed as the equivalent of "damaged or destroyed" in the Act of 1885.

We have already considered this statute of 1885 in connection with our first point as to the claims "examined, approved and allowed" by the Secretary of the Interior. But this reference to the Act of 1885 has a broader significance. The two acts must be construed as constituting but one statute, and, in fact, the Act of 1885 has been frequently referred to by the Court of Claims as furnishing a conclusive construction of the Act of 1891.

Thus in Valk v. United States, 28 Court of Claims, 241, the court said:

"The jurisdictional act of 1891, March 3rd, Chapter "538, which we are now considering, adopted the lan- "guage of the Act of 1885, to which it refers, and in our "opinion Congress intended to use therein the words 'cit- "izens of the United States' in the sense that has been "given by the Interior Department to the same words in

"the act of 1885 for the past six years, which, it must be "presumed, was known to Congress."

In Valk v. United States, 29 Court of Claims, 62, it was again held that the construction given by the Interior Department to the Act of 1885 was adopted by Congress in the Act of 1891.

In Swope v. United States, 33 Court of Claims 223, and in Friend v. United States, 29 Court of Claims 425, the Act of 1885 was referred to as showing conclusively that the Act of 1891 related only to property losses, and not to claims for personal injuries.

Thus in the Swope case, the Court uses this language:

"It is clear from the language of the Act of 1885 that "the quality of jurisdiction as recognized by the first "clause of the Act of 1891, is the same as that provided "in the Act of 1885."

So this court, in Johnson vs. United States, 160 U. S. 550, holds that no jurisdiction was conferred upon the Court of Claims by clause two of section 1, unless the claim was one which on March 3, 1885, had either been examined and allowed by the Department of the Interior, or was pending therein for examination, and the court says, p. 552:

"And the purpose of the second clause of the Act of "March 3, 1891, was to take the cases which on March "3, 1886, were pending in the department and *transfer* "*them in bulk* to the Court of Claims."

The two acts being thus essentially one act for the purpose of construction, what was the jurisdiction conferred upon theS ecretary by the Act of 1885? "The "Secretary is authorized and empowered before making "such report (*i. e.* to Congress) to cause such additional "investigation to be made, and such further testimony to "be taken, as he may deem necessary, to enable him to "determine the kind and value of all the property damaged

"or destroyed by reason of the depredations afore-"said, etc."

The Act of 1891 says "that all unpaid claims which "have heretofore been examined, approved and allowed "by the Secretary of the Interior or under his jurisdiction, "in pursuance of the Act of 1885, shall have priority of "consideration by such court, and *judgments for the "amount therein found due shall be rendered*, etc."

Is it not too clear for argument that the words "taken and destroyed" in the Act of 1891 meant "damaged or destroyed," as used in the Act of 1885, and that Congress so understood and intended? Is there anything to show that Congress intended to make any change in the law?

It has been held by the Court of Claims that the act of 1891 does not create any new liability against the Indians, but therein the United States assumed existing liabilities, which is wholly remedial, creating no new rights, but merely providing a forum for litigation. See Leighton vs. United States, 29 Court of Claims 220; Carralitos Stock Co. vs. United States, 33 Court of Claims 342.

This construction is enforced by the consideration that this claim would have been wholly barred by section 2, having occurred prior to July 1, 1865, except for the fact that it was then allowed or was pending before the secretary under the second clause of the first section.

IV.

Meaning of "Property Taken or Destroyed."

Under the constitutional provisions that property shall not be "taken" for the public use without compensation, it has frequently been held that consequential damages not actually entered upon is a "taking." The leading case on this subject is the decision of this court in Pumpelly vs. Green Bay Co., 13 Wall. 166, where it

is held that the backing of water so as to overflow the lands of an individual, or in the superinduced addition of water, earth, sand or other material or artificial structure placed on land, though done under statutes authorizing it for the public benefit, is such a "taking" as by the constitutional provision demands compensation. The court says:

"The argument of the defendant is that there is no "taking of the land within the meaning of the constitu- "tional provision, and that the damage is a consequential "result of such use of a navigable stream as the govren- "ment had a right to for the improvement of its naviga- "tion. It would be a very curious and unsatisfactory "result that in considering a provision of a constitutional "law, always understood to have been adopted for the "protection and security of the rights of the individual as "against the rights of the Government, and which has "received the commendation of jurists, statesmen and "communities as applying the just principles of the com- "mon law on that subject beyond the power or ordinary "legislation to change or control them, it should be held "that if the Government refrains from the absolute conver- "sion of real property to the use of the public, it can "destroy its value entirely, can inflict irreparable and "permanent injury in extent, can, in effect, subject it to "total destruction, without making any compensation, "because in the narrowest sense of that word it is not "taken for the public use."

The court concedes that some of the state decisions have gone to the uttermost limit of sound judicial construction, and in some cases beyond it. There is nothing in the case of Transportation Co. vs. Chicago, 99 U. S., 635, inconsistent with the principle established in Pumpelly vs. Green Bay Co., as in this case it was held there was no invasion of the property rights of the claimant. A very strongly reasoned case is that of Eaton vs. R. R. Co., 51 N. H., 504. There the court, citing the well-

known definition of Austin that the right of property is the right of indefinite user and exclusion, says:

"From the very nature of these rights of user and "exclusion, it is evident that they cannot be materially "abridged without *ipso facto* taking the owner's property. "If the right of indefinite user is an essential element of "absolute property or complete ownership, whatever "physical interference annuls this right takes property, "although the owner may still have left to him valuable "rights in the article of a more limited and circumscribed "nature. He has not the same *property* that he formerly "had."

The court concludes, speaking of the misleading use of the words "consequential damages:"

"We are not alone in the opinion that the term con- "sequential damages has been misapplied in some of the "discussions of this constitutional question. (See Criti- "cisms of Miller, J., in Pumpelly v. Green Bay Co., 13 "Wall, p. 180; Paine, J., in Alexander v. Milwaukee, "16 Wisc. 248, p. 258; Sutherland, J., in People v. "Kerr, 37 Bar. (N. Y.) pp. 403, 408; and we think that "the confusion thus engendered will account for some "erroneous decisions. If this most ambiguous expression "is to be used at all in this connection, the meaning "attached to it should always be clearly defined, as is "done in Pierce on American Railroad Law, p. 173."

See also Story v. N. Y. El. R. R. Co., 90 N. Y. 122.

As stated by Judge Cooley on Constitutional Limitations (2d Ed.), p. 545:

"Any injury to the property of an individual which "deprives the owner of the ordinary use of it is equiva- "lent to a taking, and entitles him to compensation. "* * * So a partial destruction or diminution of value "of property by an act of government which directly, "and not merely incidentally, affects it, is to that extent "an appropriation."

See also *in re* Chestnut street, 118 Pa. St. 593;

Spencer v. R. R. Co., 23 W. Va. 415, citing Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Crocker v. N. Y., 15 Fed. Rep. 405.

So the word "destroy" does not necessarily mean the physical annihilation of property. The destruction of all possible means of beneficial enjoyment or use of property is a destruction of property. Property is destroyed, although not attached directly, when the result of the act is to prevent its use. See Jones v. Erie R. R. Co., 151 Pa. St. 46.

Property, in the legal sense, consists not in the physical thing, but in the sum of the beneficial rights in the thing, the right of indefinite user. Thus the property rights of the claimants in their merchandise and teams must be construed as an entirety. Without the means of transportation to a market their merchandise was without value. The loss of the teams involved the taking and destruction of the value of the merchandise. When the teams were gone the value of the merchandise in transportation was gone.

Suppose the chance trader meeting them in the wilderness, who bought the goods at his own price had not intervened and the merchandise had been abandoned in the wilderness, and thus wholly lost to the claimant, would that not have been a taking and destruction within the meaning of the act? The learned judge of the court below says:

"The effect of the raid was not to destroy or dam-
"age the property by diminishing its quality or its quan-
"tity, but had the consequential effect of diminishing its
"value by producing a condition, the effect of which was
"to decrease its commercial worth in precipitating its sale
"in a place where there was no market in the form of
"competition."

We quote these words as illustrating how completely the essential legal conception of value was overlooked.

Value is used in law, as in economics, in its commercial and competitive sense. The goods in the then wilderness were valueless. The only value they possessed was in connection with the means of transportation to a market. What is any property worth without a market?

Thus in Railway Company vs. Minnesota, 134 U. S., 456, this court held that the deprivation of the power to charge reasonable rates for the use of property, is a deprivation of the lawful use of property, and this in substance and effect is the takng of property. The merchandise which was being transported through the wilderness to a market was instantly deprived of its value when the means of transportation through the wilderness to the market was destroyed. The value thus destroyed was property. Without the means of transportation to a market, the merchandise was as valueless to the owners as the bag of gold found by Robinson Crusoe on his island was valueless to him. The Indians, by driving off the oxen, *destroyed* the *property* in the merchandise as effectively, as if they had burned the merchandise when they drove away the oxen.

"You take my house when you do take the prop
"That doth sustain my house; you take my life
"When you do take the means whereby I live."

V.

The purpose of this statute of 1891 was remedial, to afford a forum for the adjudication of claims, giving indemnity for depredations where the injured party was not at fault, and the construction of the Court of Claims in the case at bar defeats the primary purpose of the enactment.

The Act of 1891 is a remedial statute and should therefore be liberally construed to effect the purpose for which it was enacted. Thus in United States and The

Sioux Nation vs. Northwestern Stage and Transportation Co., 164 U. S., 686, it was held that the words "citizens of the United States" must be construed to include a corporation organized under State law, the court saying at page 689, that it must be ascertained from the nature of the remedy proposed to be effected by the Indian depredation act whether the words were used in the act in their general signification. The Act in question was a provision made by the United States as a guardian of the Indians, controlling as well their persons as their property, designed to make provision for the payment of the injuries committed by its wards. The court therefore held that it was proper to consider that corporations were within the purview of words as used in the "remedial act."

In United States vs. Gorham, 165 U. S., 316, the same effect is given to the remedial purpose of the Act in holding that judgment may be rendered against the United States alone, when the tribe of Indians to which the depredators belonged cannot be identified, and such inability is stated.

"The statute shall be so construed as to suppress the "mischief and advance the remedy. * * * The "scope of the act being ascertained, the words are to be "construed as including every case clearly within that "object if they can do so by any reasonable construction, "although they point primarily to another or more limited "class of cases."

See Endlich on Construction of Statutes; Section 103.

The opinion of the Court of Claims in its review of the Indian depredation legislation entirely overlooks, as already pointed out, the very significant language of the Act of 1885, which is directly referred to in the Act of 1891. The Act of 1834, 4th Statutes at Large, p. 731,

which seems to have been in force at the time of this depredation, uses the words "take, steal or destroy," and the United States, in the event of failure to get satisfaction from the Indian Nation, guaranteed to the party so injured an eventual indemnification. As illustrative of the purpose of these enactments, we here cite different treaties between the United States and various Indian tribes, including the Osages:

OSAGES—GREAT AND LITTLE.

Ratified April 28, 1810.

ARTICLE 4, p. 527 Revision of Indian Treaties (1873):

"With a view to quiet animosities which at present "exist between the inhabitants of the Territory of Louis-"iana and the Osage Nations, in consequence of the "lawless depredations of the latter, the United States do "further agree to pay to their own citizens the full value "such property as they can legally prove to have been "stolen or destroyed by the said Osages since the acqui-"sition of Louisiana by the United States, provided the "same does not exceed the sum of $5000.00."

ARTICLE 9, p. 508 R. of I. T., (1873):

"With a view to quiet the animosities which at "present exist between a portion of the citizens of Miss-"ouri and Arkansas and the Osage tribes, in consequence "of the lawless depredations of the latter, the United "States do furthermore agree to pay, to their own citi-"zens, the full value of such property as they can legally "prove to have been stolen or destroyed by the Osages "since the year 1808, and for which payment has not "been made under former treaties; provided the sum to "be paid by the United States does not exceed the sum "of $5000.00."

ARTICLE 6, p. 584 R. of I. T., (1873):

"The United States agrees to pay all claims against "the Osages for depredations committed by them against

"other Indians or citizens of the United States to an "amount not exceeding $30,000.00; provided that the "said claims shall be previously examined under the "direction of the president."

BLACKFOOT.

ARTICLE 2, p. 10 R. of I. T., (1873):

"The aforesaid tribes * * promise to be friendly "with all citizens thereof (U. S.) and to commit no dep- "redations or other violence upon such citizens, and "should any one or more violate this pledge * * the "property taken shall be returned, or in default thereof, "or if *injured* or destroyed, compensation may be made "by the Government out of the annuities."

CALAPOOIAS.

ARTICLE 6. Words "injured or destroyed" used as above, p. 22.

CHASTAS.

ARTICLE 8, p. 25, words "injured or destroyed used as above. Proclaimed April 10, 1855.

MAKHA TRIBE.

Treaty between the United States and Makha Tribe of Indians Proclaimed April 18, 1859.

ARTICLE 9, on p. 463, Revision of Indian Treaties (1873):

"The said Indians * * pledge themselves to "commit no depredations upon the property of such "citizens, and should any one or more of them violate this "pledge * * the property taken shall be returned, or "in default thereof, or if injured or destroyed compensa- "tion may be made by the Government out of their "annuities."

Treaty between the United States and the confederated triber and bands of Indians in middle Oregon, ratified March 8, 1859.

ARTICLE 7, p. 627, Revision of Indian Treaties (1873):

"The confederated bands * * pledge themselves "to commit no depredations on the property of said "citizens; and should any one or more of them violate "this pledge * * the property taken shall be returned, "or in default thereof, or if injured or destroyed, com- "pensation may be made by the Government out of their "annuities."

PONCAS.

Treaty between the United States and the Ponca tribe of Indians, ratified March 8, 1859.

ARTICLE 7, p. 664, Rev. of Indian Treaties:

PONCAS.

"The Poncas * * * pledge themselves * * "* to comit no injuries or depredations on their (citi- "zens of the U. S.) persons or property, nor on those of "members of any other tribe; but in case of such injury "or depredation full compensation, as far as practicable, "shall be made therefor out of their tribal annuities; the "amount in all cases to be determined by the Secretary "of the Interior."

QUI-NAI-ELTS.

Treaty with Qui-Nai-Elts, ratified March 8, 1859.

ARTICLE 8, p. 725, Rev. of Indian Treaties, (1873):

"The said tribes and bands * * * pledge them- "selves to commit no depredations on the property of such "citizens; and should any one or more of them violate "violate this pledge * * * the property taken shall be "returned or, in default thereof, or if injured or

"destroyed, compensation may be made by the Govern-"ment out of their annuities."

S'KALLAMS.

Treaty with S'Kallams, ratified March 8, 1859.

ARTICLE 9, p. 803, Rev. of Indian Stats, (1873):

Same provision as above.

Thus we have compensation provided for property "stolen or destroyed," "injured or destroyed," "all claims for depredations committed;" in the Act of 1885, property "damaged or destroyed," and in the Act of 1891, which was enacted, not to create new liability, but to provide for the final adjudication of existing claims, the words "taken or destroyed" are used.

The purpose of these treaties and the Indian depredaiion acts has uniformly been to maintain peace upon the frontier by guaranteeing indemnity or redress for depredations, provided the injured party was not at fault and did not attempt to obtain private satisfaction or revenge. Thus the title to the Act of 1834 was, "An Act to regulate Trade and Intercourse with the Indians and to Preserve Peace on the Frontier."

That construction should therefore be adopted which will best promote the purposes intended, and the words of a statute are to be best understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature had in view. See Endlich on Interpretation of Statutes, 73. Cited in reference to Indian depredation acts in Leighton vs. United States, 29 Ct. of Cl., 288, and affirmed by this court.

Is it not clear, therefore, that the words "taken or destroyed" in the Act of 1891 are intended to be used in their broad and comprehensive sense and intended to

include all cases of Indian claims then existing and not barred by limitation under the Act, and must be taken as equivalent to the words "injured or destroyed" and "damaged or destroyed" in former statutes and treaties?

This claim has now been pending before Indian Agencies, Congress, in the Interior Department and in the Court of Claims for over forty years. It was carefully investigated by the Indian Department, through its special agents, and the claim was examined, approved and allowed by the Secretary of the Interior, under the direction of Congress, before the passage of this act of 1891.

We submit, therefore, that the judgment of the Court of Claims was clearly erroneous, and that upon the conceded facts appellant is entitled to recover his full damages as found by the Secretary of the Interior as directed by the Act of 1885, and judgment should therefore be entered for the sum of six thousand eight hundred dollars ($6,800), being the damages so found by the Secretary of the Interior and admittedly sustained by claimant from said depredation, in lieu of the sum of four hundred dollars ($400) found by the Court of Claims.

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